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In the Supreme Court of the United States

OCTOBER TERM, 1947

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v.

W. FRANK WATKINS, AS DISTRICT DIRECTOR OF IMMIGRATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT WITH RESPECT TO MOOTNESS

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This Court has directed both parties to discuss the question of whether this case is moot. Sup. Ct. Journal, April 19, 1948, p. 220. That issue arises out of the following circumstances:

Petitioner's application for a writ of certiorari was originally denied on January 12, 1948. Sup. Ct. Journal, Jan. 12, 1948, p. 122. A petition for rehearing was filed on January 27, 1948, and, on February 2, 1948, this Court entered an order staying the removal of petitioner. Sup. Ct. Journal, Feb. 2, 1948, p. 136. Thereafter, petitioner filed a motion seeking action on his petition for

rehearing which was denied on March 8, 1948. Sup. Ct. Journal, March 8, 1948, p. 167.

The next day, March 9, 1948, he filed a new application for a writ of habeas corpus in the United States District Court for the Southern District of New York, urging primarily that he be given a parole in order to enable him to effect a voluntary departure. The writ, which had issued on March 19, 1948, was dismissed on March 25, 1948, and, on March 30, 1948, petitioner filed a petition for rehearing and for a stay of removal, expressing the view that the stay granted by the Supreme Court might lapse with a decision in the *Ahrens* case, No. 446, this Term, while petitioner's proceedings in the district court were still pending.

On March 26, 1948, the petitioner wrote a letter to the Chief of the Alien Parole Section requesting a parole in order to enable him to arrange for his voluntary departure, stating in the letter that he should definitely prefer to stay in America but that voluntary departure was the only alternative left to him if the authorities insisted upon his leaving the United States.

On March 31, 1948, petitioner was granted a parole pursuant to an agreement in which he stated that he understood he was granted a 30-day parole for the express purpose of effecting his departure from the United States, and that if he could not produce a visa or evidence that it could be obtained, he would surrender to Ellis

Island on May 3, 1948, for immediate involuntary removal to Germany. He further agreed that he would report to an immigration inspector on Ellis Island by telephone once a week,[1] that he would withdraw his application for rehearing to the Southern District of New York and that habeas corpus proceedings would be discontinued. A copy of the agreement is set forth in the Appendix, *infra*, p. 11.

On March 31, 1948, the petitioner wrote a letter to the district judge withdrawing his petition for rehearing, explaining that he had been paroled. Before he received the letter on April 1, 1948, the district judge had, however, on March 31, 1948, denied the petition for rehearing and the application for a stay of removal.

On April 5, 1948, this Court granted petitioner's application for rehearing, vacated its order denying certiorari, and granted certiorari (R. 46). The question to which this memorandum is addressed is whether, in view of the circumstances described above, this Court can proceed to a decision of this cause on its merits.

We start with the well-established principle that habeas corpus is a judicial inquiry into the cause of restraint of liberty and that "there is no warrant in either the statute or the writ for its use to invoke judicial determination of questions

[1] This requirement has since been modified to permit the petitioner to report to the Washington, D. C., field office of the Immigration and Naturalization Service.

which could not affect the lawfulness of the custody and detention." *McNally* v. *Hill*, 293 U. S. 131, 137; *Eagles* v. *Samuels*, 329 U. S. 304, 307. Furthermore, this Court has held that the restraint must be physical, and not merely a moral restraint. Thus, where a military officer was ordered to confine himself to the city of Washington pending trial by court-martial, this Court held that he was not under such restraint as would entitle him to obtain a writ of habeas corpus. *Wales* v. *Whitney*, 114 U. S. 564, 572–574. So also, a person at large on recognizance, except where he is released by virtue of seeking the writ itself, is deemed not to be in custody and therefore not in a position to apply for a writ of habeas corpus. *Johnson* v. *Hoy*, 227 U. S. 245; *Stallings* v. *Splain*, 253 U. S. 339, 342. And a prisoner who has been conditionally released or paroled, and who while on parole is technically "in the legal custody and under the control of the warden" (18 U. S. C. 716) is nevertheless deemed not to be in such custody as would justify issuance of the writ of habeas corpus; *Baker* v. *Hunter*, 323 U. S. 740; *Weber* v. *Squier*, 315 U. S. 810.

On the other hand, the restraint of liberty which will support a petition for a writ of habeas corpus need not be actual confinement behind bars. Thus, a person unlawfully inducted into military service may bring habeas corpus to secure his release from military custody, although the restraint on his liberty is merely that imposed against all

soldiers subject to military orders. *United States ex rel. Steinberg* v. *Graham*, 57 F. Supp. 333 (E. D. Ark.); see *Eagles* v. *Samuels*, 329 U. S. 304.[3] It has been held that even where a selective service inductee was transferred to the Enlisted Reserve and allowed to go home for fourteen days to settle his affairs, he was nevertheless sufficiently restrained of his liberty to justify the bringing of a writ of habeas corpus, since in that interval he was still subject to military orders. *United States ex rel. Altieri* v. *Flint*, 54 F. Supp. 889 (D. Conn.), affirmed, 142 F. 2d 62 (C. C. A. 2). On the basis of this decision, one district court has held, in an unreported case, that an alien enemy granted a parole similar to that given to petitioner here was nevertheless in a position to bring habeas corpus to challenge the validity of the order of removal issued against him. *United States ex rel. Hubert Jaegeler* v. *Carusi*, decided June 16, 1947 (E. D. Pa.).[4]

If the petitioner had been on parole at the time he originally filed his application for habeas

[3] This situation is distinguishable from that presented in *Wales* v. *Whitney*, 114 U. S. 564, since there petitioner was not seeking to be released from the ordinary military restraints that flowed from his position as a naval officer, but only from the additional restraint arising from the order directing him to confine himself to the city of Washington.

[4] Compare the unreported decision in *United States ex rel. Lindeney* v. *Watkins*, decided January 21, 1947 (S. D. N. Y.), holding, on the basis of the *Altieri* decision, that an alien on parole under the immigration laws until he was wanted for deportation could bring habeas corpus.

corpus, the Court would be faced with the problem of deciding whether the *Altieri* decision was consistent with such of this Court's rulings as *Wales* v. *Whitney*, and, if so, whether alien enemy parolees are in a custodial status more akin to that of selective service inductees or to that of the officer involved in *Wales* v. *Whitney*. Among the factors to be considered would be the following: (1) The petitioner's present parole is required neither by the statute nor the regulations; he had previously been granted a parole, ending on June 25, 1946, pursuant to Section 22 of the Act, and Section 30.74 of the Regulations. See Appendices A and C of our main brief, pp. 32, 37–38. Since his present parole was, in a sense, an act of grace, it is possible that it could be revoked at any time and for any reason. (2) Petitioner now takes the position that his agreement to attempt voluntarily to depart is no longer binding. Hence revocation of parole by the Government might be justified on this ground. (3) Petitioner has not been prejudiced in any way by acting pursuant to the parole agreement. Although he withdrew his petition for rehearing in the district court, that court had already denied that petition. See *supra*, p. 3. Moreover, the time for an appeal to the Circuit Court of Appeals has not yet expired. Rule 73, Rules of Civil Procedure, as amended, 329 U. S. 866. (4) There is some question as to whether petitioner could lawfully bind himself, as he sought to do in the

parolee's agreement, to dismiss his habeas corpus proceedings and, indeed, to submit to "involuntary removal" if he should fail in his efforts to remove himself voluntarily. Cf. *United States* v. *Andrews*, 240 U. S. 90.[4] Thus, the agreement may, in any event be unenforceable and therefore not binding on either of the parties to it. (5) Petitioner might possibly have arranged for a voluntary departure and that would certainly moot the case; on the other hand, if he fails to make such arrangements, he must return to Ellis Island on May 3, 1948, and make weekly reports in the meantime. Unless and until he leaves the country, he is subject to supervisory control and an imminent return to complete custody. (6) Petitioner's agreement to attempt voluntarily to depart was made only because it seemed to be the only alternative to involuntary removal. He would prefer to remain in the United States.

The weight to be accorded these various factors is not wholly clear. We do not attempt to resolve this difficulty because we think that, in the present circumstances, the problem may more readily be disposed of on other grounds. It is not necessary to decide whether petitioner could, originally, have filed an application for habeas corpus had he been on parole. The question is whether this Court can exercise an appellate jurisdiction to

[4] It is, of course, clear that the petitioner cannot be removed while this Court's stay order is in effect. See *supra*, p. 1.

review the action taken by the courts below when petitioner was actually in custody.

If by May 3, 1948, petitioner has not made arrangements for his voluntary departure from the United States—and he has indicated that since the grant of certiorari by this Court he has made no attempt to make such arrangements—he will, after May 3, be back in the very same custody under the very same order which he initially attacked. After May 3, therefore, an opinion by this Court in this proceeding will determine the propriety of the exercise of judicial power by the lower courts in this case on the very same issue which was before those courts, and the judgment of this Court will affect the litigants in the case before it. After May 3, the judgment of this Court can be just as effective on the very issues presented by this case, as if the 30-day parole had never been granted. Practically, therefore, the situation is no different than would have been presented if petitioner had been granted release by a court pending his appeal, a circumstance which would not render the proceeding moot. *Eagles* v. *Samuels*, 329 U. S. 304, 308–309. Hence, we think that the parole here has resulted, at most, in a suspension of the power of this Court to act for the period of parole, rather than in a complete destruction of the cause of action, and that this Court may properly determine the issues before it if petitioner is actually in custody at the time that this Court acts in the cause.

The suspension of a right to appellate review, and the restoration of that right when the conditions causing the suspension are terminated, is not an unknown situation. Thus, where a prisoner escapes pending appeal, this Court has refused to hear his cause, partly on considerations of policy, and partly because, while the prisoner is an escapee, a judgment by the court would be ineffective. *Smith* v. *United States*, 94 U. S. 97; *Bonahon* v. *Nebraska*, 125 U. S. 692. Nevertheless, in these same decisions, this Court indicated that if the petitioner later brought himself under the control of the court, his case would be restored to the docket. See also *Wagner* v. *United States*, No. 749, this Term, decided April 19, 1948—where this Court ordered an appeal reinstated although appellant had been a fugitive for a number of years. We think that even if petitioner could not have brought habeas corpus while he was out on parole any more than an escaped defendant could be tried, his case may nevertheless be determined by an appellate court, so long as the controversy is not moot—as it is not in this case—and so long as, at the time the court is called upon to act, petitioner is in a position where the order of this Court can be effective.[5]

[5] An alternative device possibly available would be the issuance of an original writ of habeas corpus by this Court in aid of its appellate jurisdiction after the petitioner's return to Ellis Island.

The Government will undertake promptly to notify this Court of the petitioner's return to Ellis Island.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORRISON,
Assistant Attorney General.
STANLEY M. SILVERBERG,
Special Assistant to the Attorney General.
SAMUEL D. SLADE,
BEATRICE ROSENBERG,
Attorneys.

APRIL 1948.

APPENDIX

March 31, 1948.

Parolee's Agreement

I, Kurt George Wilhelm Ludecke, a national of Germany, in consideration of my parole under regulations relating to alien enemies, hereby agree to keep in close touch with Inspector Joseph Judge, Immigration and Naturalization Service, Ellis Island, New York, and to that end I agree to report to him by 'phone on Thursdays during this period between the hours of 9:30 a. m. and 4 p. m. (Whitehall 38877, Ext. 85). I also agree to comply with all provisions of the regulations pertaining to alien enemies and with all the terms of my parole.

I understand that I am being granted a 30-day parole for the express purpose of effecting my departure from the United States under the outstanding removal order issued by the Attorney General, in my case. I agree that if I cannot produce a visa or evidence that it can be obtained and depart from the United States on or before May 1, 1948 under the outstanding removal order, as stated in my letter of March 26, 1948, I will surrender to Ellis Island not later than the 3:45 p. m. ferry on Monday, May 3, 1948 for immediate involuntary removal to Germany.

(Sg.) Kurt Ludecke.

P. S. I further agree that the appeal for a rehearing submitted on March 30, 1948, to the Southern District of New York, will be withdrawn and habeas corpus proceedings discontinued.

(Sg.) Kurt Ludecke.